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Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KELVAN BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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22 pp

QUESTIONS PRESENTED

1. Whether a seizure under the Fourth Amendment has occurred when the police detain an airline passenger's luggage after the luggage has been checked and is in the possession of the airline?

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The Petitioner, KELVAN BROWN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 13, 1989.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is

reported and is attached as Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1) and (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment, United States Constitution, provides:

> The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE FACTS

Following the district court's denial of his motion to suppress evidence,

Kelvan Brown entered a conditional guilty plea under Federal Rules of Criminal Procedure, Rule 11(a)(2) to one count of possession of cocaine for purposes of distribution in violation of 21 U.S.C., section 841(a)(1). He was sentenced to five years in custody. On appeal to the Ninth Circuit Court of Appeals, the conviction was affirmed.

At 11:15 p.m. on February 19, 1988 narcotics detectives May and Gossett saw the Petitioner Kelvan Brown enter Los Angeles International Airport. He carried three pieces of luggage and a briefcase, all of which appeared to be new. He appeared to the officers to be nervous. After paying cash for a one-way ticket to Columbus, Ohio, Brown checked two of his suitcases. May and Gossett arranged to have Brown's luggage held. They asked Brown if they could speak to him. They

informed him that he was not under arrest and that he was free to leave. The detectives then asked Brown if he understood and would talk with the officers. Brown said "Yes, I understand. What is this all about?" As they spoke, Brown appeared increasingly nervous. When asked for some form of identification, Brown said he was not carrying any. When asked his name, Brown told the detectives that he was "Pearl Lang." Brown consented to a pat-down search and to a search of the luggage he was carrying. During the pat-down, detective Gossett noticed what felt like a card and a set of keys. Brown voluntarily removed the card and showed it to the officers. It was a driver's license identifying Brown by his true name. The detectives asked Brown if they could search his checked luggage. He replied "Sure, you can search it."

The luggage was locked, and the detectives asked Brown for the keys. Brown said the keys were in Ohio. At detective Gossett's request, Brown removed a set of keys from his pocket. The keys appeared to be luggage keys. Brown stated that the keys would not open his checked suitcases. The detectives asked whether Brown would accompany them to try the keys in the luggage. Brown asked "Do I have to go?" The detectives replied that he did not, but that he would be detained while his luggage was checked. Brown was handcuffed pending the outcome of the search. The keys Brown provided opened the checked luggage which was found to contain about two kilograms of cocaine.

REASON FOR GRANTING THIS PETITION

I

A SEIZURE UNDER THE FOURTH AMENDMENT HAS OCCURRED WHEN THE POLICE DETAIN AN AIRLINE PASSENGER'S LUGGAGE AFTER THE LUGGAGE HAS BEEN CHECKED AND IS IN THE POSSESSION OF THE AIRLINE

In the Petitioner's case, the Ninth Circuit has held that a brief detention of the Petitioner's luggage by the police after the luggage was checked and was in the possession of the airline was not a "seizure" of the luggage under the Fourth Amendment. Since no seizure occurred, the Government was not required to justify the detention with evidence of a reasonable, articulable suspicion by the police that the luggage contained evidence of a crime. The Petitioner contends that this ruling is contrary to the language of the Fourth Amendment and

the prior case authority of this Court.

The Fourth Amendment states that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...." [emphasis added]. Certainly, a person's luggage would be included in the definition of a person's effects.

Indeed, this Court has stated that "[L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." Arkansas v. Sanders, 442 U.S. 753, 762 (1979). Luggage does not lose its Fourth Amendment protection simply because it is highly mobile, (See id. at 764-765) or because it turns up in public places (see id. at 767)(Burger, C.J., concurring in the judgment). To the traveler away from home, the closed

suitcase containing personal belongings represents one of the few bulwarks of privacy. United States v. Beale, 736 F.2d 1289, 1293 (9th Cir. 1984) (Pregerson, J., dissenting).

This Court has stated that "A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). In Jacobsen, the Court found that a seizure had occurred when a police officer asserted dominion and control over a package that had been sent through Federal Express. By analogy to the Jacobsen case, the police seized the Petitioner's luggage when they stopped the airline employees from moving the luggage onto the airplane.

In United States v. Place, 462 U.S. 696 (1983) this Court held that before

the police may seize a suspect's bag or luggage in order to temporarily detain the luggage pending a dog sniff or the obtaining of a warrant, the police must have a reasonable suspicion under Terry v. Ohio, 392 U.S. 1 (1968) in order to justify such a seizure. Likewise, in United States v. Van Leeuwen, 397 U.S. 249 (1970) a similar reference was made to Terry v. Ohio, supra, in a case where a police officer directed a postal clerk to hold two mailed packages at the post office while the officer conducted an investigation. There was no Fourth Amendment violation because the police officer has reasonable cause to suspect the packages contained evidence of a crime.

In Petitioner's case, the lower court found that no requirement was placed on the police to have reasonable suspicion before detaining checked luggage at the

airport. Certainly it cannot be that an airline passenger has no Fourth Amendment rights once he has checked his luggage at the airport. Therefore, the Petitioner contends that the Ninth Circuit's opinion is in error.

CONCLUSION

Based upon the foregoing, Petitioner urges that this petition be granted.

Respectfully submitted,

JOSEPH T. VODNOY

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Attorneys for Petitioner
KELVAN BROWN

EXHIBIT "A"

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. KELVAN BROWN, *Defendant-Appellant.*	No. 88-5378 D.C. No. CR-88-0153-FFF-2 OPINION

Appeal from the United States District Court
for the Central District of California
Ferdinand F. Fernandez, District Judge, Presiding

Submitted August 7, 1989*
Pasadena, California

Filed September 13, 1989

Before: James R. Browning, Jerome Farris and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Farris

SUMMARY

Search and Seizure

Affirming the district court's judgment of conviction and denial of a motion to suppress, the court held that a person is "seized" within the meaning of the Fourth Amendment only,

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

if in view of all the surrounding circumstances, a reasonable person would believe that he was not free to leave.

After narcotics detectives May and Gossett saw appellant Kelvan Brown enter Los Angeles International Airport, they arranged to have his checked luggage held and asked if Brown would talk with them, informing him that he was not under arrest and was free to leave. Brown agreed and later gave consent to the agents' searching his luggage, Brown himself providing the keys. The luggage contained two killograms of cocaine.

[1] Brown claimed that the detectives violated his Fourth Amendment rights by initially stopping him and holding his checked luggage. [2] A reasonable person in Brown's shoes would have believed he was free to leave. The detectives did not touch Brown, display weapons, or restrain him in any way. They explicitly told him he was free to go. Brown agreed to speak with them, and thus it was a consensual encounter. [3] Even if Brown had not consented to a search, the brief detention of his bags would not have interfered with his travel or frustrated his expectations with respect to his luggage. No seizure occurred. [4] Since no threats, force or restraints were employed at the time the detectives asked for Brown's consent to search and there was no indication that Brown had withdrawn his unambiguous statement of consent, the district court properly found that Brown had voluntarily consented to the search.

COUNSEL

Joseph T. Vodnoy and Joseph F. Walsh, Los Angeles, California, for the defendant-appellant.

Stephen A. Mansfield, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

FARRIS, Circuit Judge:

Kelvan Brown appeals the district court's denial of his motion to suppress two kilograms of cocaine found in his suitcase. After the court denied his motion to suppress, Brown pleaded guilty to possession with intent to distribute cocaine. We affirm.

Background

At 11:15 p.m. on February 19, 1988, narcotics detectives May and Gossett saw Brown enter Los Angeles International Airport. He carried three pieces of luggage and a briefcase, all of which appeared to be new. He appeared to the officers to be nervous. After paying cash for a one-way ticket to Columbus, Ohio, Brown checked two of his suitcases. May and Gossett arranged to have Brown's luggage held. They asked Brown if they could speak to him; they informed him that he was not under arrest and that he was free to leave. The detectives then asked Brown if he understood and would talk with the officers. Brown said: "Yes, I understand. What is this all about?" As they spoke, Brown appeared increasingly nervous. When asked for some form of identification, Brown said he was not carrying any. When asked his name, Brown told the detectives that he was "Pearl Lang." Brown consented to a pat-down search and to a search of the luggage he was carrying. During the pat-down, detective Gossett noticed what felt like a card and a set of keys. Brown voluntarily removed the card and showed it to the officers. It was a driver's license identifying Brown by his true name. The detectives asked Brown if they could search his checked luggage. He replied: "Sure, you can search it." The luggage was locked, and the detectives asked Brown for the keys. Brown said the keys were in Ohio. At detective Gossett's request, Brown removed a set of keys from his pocket. The keys appeared to be luggage keys. Brown stated that the keys would not open his checked suitcases. The

detectives asked whether Brown would accompany them to try the keys in the luggage. Brown asked: "Do I have to go?" The detectives replied that he did not, but that he would be detained while his luggage was checked. Brown was handcuffed pending the outcome of the search. The keys Brown provided opened the checked luggage which was found to contain about two kilograms of cocaine.

Standard of Review

We review de novo the lawfulness of a search. *United States v. Limatoc*, 807 F.2d 792, 794 (9th Cir. 1987). Findings of historical fact made at a suppression hearing are reviewed for clear error. *Id.*

Discussion

[1] Brown claims that the detectives violated his Fourth Amendment rights by initially stopping him and holding his checked suitcases. The district court correctly held that neither initially approaching Brown nor holding his baggage constituted a seizure of person or property implicating Fourth Amendment rights.

[2] The detectives' initial contact with Brown was not a seizure of his person. While arrests and investigatory stops are seizures, "not all encounters between law enforcement agents and citizens amount to seizures of the person." *United States v. Safirstein*, 827 F.2d 1380, 1383 (9th Cir. 1987). A person is " 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A reasonable person in Brown's shoes would have believed he was free to leave. The detectives approached Brown in public. They did not display weapons, touch Brown, or restrain him in any way. They asked in a non-threatening way if they could speak to Brown and told him explicitly that

he was free to go. Brown agreed to speak with the detectives. This was a consensual encounter. *See United States v. $25,000 U.S. Currency*, 853 F.2d 1501, 1505 (9th Cir. 1988).

[3] Brown claims that his checked suitcase was unlawfully seized. We must determine whether the brief diversion of Brown's suitcases from their journey to the cargo hold was a seizure. This is a question of first impression in this circuit. "A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988), the Fifth Circuit held that briefly delaying checked luggage by removing it from a conveyor belt was insufficient to constitute a meaningful interference with possessory interests. The *Lovell* court distinguished *United States v. Place*, 462 U.S. 696 (1983). There, the court held that taking luggage from a person's custody was a seizure. The *Lovell* court noted the distinction between taking property from a traveler's custody and merely detaining bags which the traveler has already relinquished to a third-party common carrier. We agree with the Fifth Circuit's approach. Had Brown not eventually consented to a search, the brief detention of his bags would have in no way interfered with his travel or frustrated his expectations with respect to his luggage. No seizure occurred.

[4] Brown next contends that his consent to the search of his luggage was not voluntary. We review the district court's factual conclusion that consent was voluntary for clear error. *United States v. Vasquez*, 858 F.2d 1387, 1389 (9th Cir. 1988). The court's conclusion was not clearly erroneous. No threats, show of force, or restraints were employed at the time the detectives asked for Brown's consent to the search. The detectives did not use a harsh or intimidating tone of voice. Brown was informed that he was free to leave. He made statements throughout the encounter which manifested understanding of what was occurring. Any reluctance Brown showed in admitting he was carrying the keys to his luggage

was not enough to indicate he had withdrawn his unambiguous statement of consent. The district court properly found that Brown consented to the search.

AFFIRMED.